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No. 88-1192

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

ALVIE B. GRAHAM,
Petitioner,

vs.

JUDGE J. WARREN BETTIS, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

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STATEMENT OF FACTS

Plaintiff-petitioner was involved in a domestic relations case in the Court of Common Pleas of Columbiana County, Ohio, Case No. 80 CIV 1000. In that case, a decree of divorce was entered December 17, 1980. On April 30, 1981, petitioner filed a motion for modification of the divorce decree. On May 21, 1981, petitioner's former wife also filed a motion for modification. The trial court conducted a hearing on both parties' motions on May 29, 1981, and during the hearing, it found petitioner in direct contempt of court

and sentenced him to ten days in the county jail. Petitioner did not appeal the contempt finding. On August 18, 1981, the trial court issued its judgment entry sustaining the motion for modification of petitioner's wife and overruled petitioner's motion. The petitioner did not appeal this judgment.

On May 19, 1982, petitioner filed a motion for relief from judgment pursuant to Ohio Civil Rule 60(B). The court never ruled on this motion, and a notice of appeal was filed in that case in conjunction with the notice of appeal in Case No. 82 CIV 695. The Court of Appeals dismissed the appeal as to Case No. 80 CIV 1000 for the reason that there was no final order from which a timely appeal could be taken.

On May 27, 1982, petitioner filed a complaint for damages in the Columbiana County Court of Common Pleas, being Case No. 82 CIV 695, seeking money damages from various defendants and alleging negligence on the part of defendant-respondent Eugene Smith. In that case, a notice to take the deposition of the petitioner was filed July 15, 1982, scheduling the deposition for July 27, 1982. Said deposition was continued at petitioner's request, and a second notice was filed scheduling the deposition for August 4, 1982. That deposition was continued at petitioner's request and rescheduled for August 30, 1982. Formal notice of deposition for August 30, 1982, was filed. Counsel for respondent Eugene Smith appeared at the courthouse in Lisbon, Ohio, on August 30, 1982, the designated time and place of the deposition, but petitioner failed to attend the deposition. All defendants-respondents filed similar motions for sanctions and dismissal, and the matter came on for hearing. The trial court sustained the motions of the various respondents for dismissal and sanctions.

Petitioner then appealed to the Court of Appeals for the Seventh District of Ohio in Case No. 84 C 51. This was a combined appeal of Case No. 80 CIV 1000 and Case No. 82 CIV 695. The judgment of the trial court as to the appeal in Case No. 82 CIV 695 was affirmed. As mentioned above, the appeal of Case No. 80 CIV 1000 was dismissed for lack of a final appealable order.

Petitioner then appealed to the Supreme Court of Ohio and filed a Memorandum in Support of Jurisdiction urging the Supreme Court to direct the appellate court to certify the record. The Ohio Supreme Court overruled petitioner's motion, this being Case No. 88-754. It is from this ruling that petitioner appeals to this Court.

While petitioner's briefs throughout this litigation have followed a rambling style which makes it difficult to focus precisely on the issue, it is unquestioned that petitioner did not attend the scheduled depositions pursuant to notice. Petitioner knowingly and wilfully refused to comply with the discovery requests properly made under the Ohio Rules of Civil Procedure. Ohio procedural law supports such an action as within the trial court's discretion. As stated in *Rauchenstein v. Kroger Co.* (1981), 3 Ohio App. 3d 178, syllabus paragraph one:

> "Where it has not been established that failure to comply with a discovery order was due to inability, such as illness, rather than wilfullness, bad faith, or any other fault of the party failing to comply, the trial court does not abuse its discretion in ordering dismissal of the pending action pursuant to Civ. R. 37(B)."

Thus, it was petitioner's obligation to rebut a motion for sanction of dismissal by establishing that his failure to comply was due to inability and with good

cause. There was no such evidence in this case, and the trial court's dismissal was appropriate and held properly within the trial court's discretion by the Court of Appeals.

As to the domestic relations case, Case No. 80 CIV 1000, the Court of Appeals properly determined that at the time the notice of appeal was filed, there was no final appealable order from which a timely appeal could be made.

Petitioner makes a number of references to the absence of a qualified judge to hear his cases. The domestic relations case was initially assigned to Judge J. Warren Bettis. At the request of respondent Eugene Smith, who was then representing petitioner, Judge Bettis voluntarily excused himself, and the case was reassigned to Judge Richard D. Kennedy (at that time, there were two full-time common pleas court judges assigned to the Columbiana County Pleas Court). Subsequently, petitioner sought to have Judge Kennedy removed from the case, and Judge Kennedy agreed to step aside in both the domestic relations case, 80 CIV 1000, and the case for damages, 82 CIV 695. Thereafter, the Ohio Supreme Court assigned the case to Judge David T. Matia.

Petitioner's numerous references to lack of a qualified judge have no basis and, in all events, were never properly raised. Judge Matia is from Cuyahoga County and served by appointment of the Ohio Supreme Court as a visiting judge in this matter.

Petitioner's reference in question four to a mandamus refers to an action in mandamus petitioner filed in the Ohio Supreme Court, Case No. 82-1517. This case was dismissed by the Ohio Supreme Court April 20, 1983, and no appeal was taken from this ruling.

CONCLUSION

The Ohio Supreme Court did not find that this case merited the acceptance of jurisdiction and further appellate review. None of the grounds petitioner raises are of the character described in Rule 17 of the United States Supreme Court Rules. The substance of this case, as presented in the Court of Appeals and as addressed to the Ohio Supreme Court, deals with two rather limited issues: first is the issue of whether there existed a final appealable order in Case No. 80 CIV 1000, and second whether the trial court abused its discretion in the application of sanctions to Ohio discovery procedures in Case No. 82 CIV 695. There certainly is no federal question which has been raised in this litigation.

For the reasons stated, respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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